

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHONG DUONG and THUY THI BUI	:	CIVIL ACTION
Plaintiffs	:	
	:	
v.	:	
	:	
TELFORD BOROUGH and POLICE	:	
OFFICER DANIEL FOX	:	
Defendants	:	NO. 03-2985

MEMORANDUM AND ORDER

McLaughlin, J.

June 24, 2004

This case arises out of the shooting of Phong Duong by Officer Daniel Fox. The shooting occurred after Officer Fox entered Mr. Duong's residence in response to a call that three suspicious males were near the plaintiff's home. The Court granted the defendants' motion to dismiss certain counts of the complaint on September 22, 2003. The defendants have now moved for summary judgment on the one remaining claim under 42 U.S.C. § 1983: that Officer Fox and the Telford Borough violated Mr. Duong's Fourth Amendment rights.¹ The Court held a hearing on

¹ The plaintiff also has claims under 42 U.S.C. § 1981 against Officer Fox and Telford Borough and for intentional infliction of emotional distress against Officer Fox. His wife, Thuy Thi Bui has a claim against Officer Fox for loss of consortium. At oral argument, the plaintiff conceded that he did not have a claim for
(continued...)

June 16, 2004. The Court will deny the motion in part and grant it in part.

I. Facts

The facts in this case are as follows. The disputed facts involve the plaintiff's position at the time of the shooting.

On the morning of May 10, 2001, Officer Fox was at the Telford Borough police station. He received a dispatch for a report of suspicious persons. He proceeded to the location in his patrol car. He spoke to a neighbor. She stated that she saw three suspicious Asian males sitting on a lawn and that the males had gone into a tan house. Defs.' Mot. For Summ. J. (hereinafter "Defs.' Mot."), Ex. A at 70.

Officer Fox located the house, because the screen door was open. He could hear shouting and hollering from inside of the house. He opened the door and saw the resident male on his

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intentional infliction of emotional distress or a claim under 42 U.S.C. § 1981. Summary judgment is granted as to these claims. Thuy Thi Bui's claim for loss of consortium under Pennsylvania law derives only from the other spouse's recovery in tort. See, e.g., Szydlowski v. City of Philadelphia, 134 F. Supp. 2d 636 (E.D. Pa. 2001); Danas v. Chapman Ford Sales, Inc., 120 F. Supp. 2d 478, 489 (E.D. Pa. 2000); Quitmeyer v. Southeastern Pennsylvania Transit Auth., 740 F. Supp. 363, 370 (E.D. Pa. 1990). Summary judgment, therefore, is also granted as to this claim.

back and an Asian male on top of him. There were three other Asian males in the home. A female was standing near the steps. The officer called for backup. All of the males then ran to the back of the home. At this point, the officer believed that he had walked in on a violent domestic dispute, and he did not know which male was the homeowner. In reality, the three Asian males had entered the plaintiffs' residence in order to rob them.² Defs.' Mot., Ex. A at 70-71.

Mr. Duong chased the other men to the back of the house with a knife in his hand. He testified that he chased the men to prevent the intruders from escaping his house through the back door. Officer Fox followed them. Officer Fox believes that he unholstered his weapon as he was following the males. Officer Fox stated that he yelled "Police, stop." The officer saw that the plaintiff had a knife in his right hand. He recalls telling the plaintiff to drop the knife. However, the plaintiff testified that he did not see Officer Fox or hear anything from him before he was shot. Defs.' Mot., Ex. B at 35, 40; Ex. C at 17.

² Before Officer Fox entered the home, one of the three men had placed a gun to Mr. Duong's head and demanded money. Another man had held two knives to his wife's head. Mr. Duong had managed to pick up one of the knives. Defs.' Mot., Ex. A at 17-19, 49-51; Pls.' Resp., Ex. C.

At this time, there was shouting and screaming. Mr. Duong then heard his wife say in Vietnamese that the police were there and to sit down. Defs.' Mot., Ex. A at 54; Ex. B at 36, 42.

Mr. Duong's position and movements at this point in time are disputed by the parties. According to the plaintiff's expert report, Mr. Duong was thirteen feet away from Officer Fox when Officer Fox shot him in the arm. This report is based on examination of the crime scene and interviews with the plaintiffs. Pls.' Resp. to Defs.' Mot. (hereinafter "Pls.' Resp."), Ex. C at 3-4. The plaintiff's oldest child, who was not present during the incident, measured the distance between the bullet holes to where the police were standing, based on Thuy Thi Bui's description. He measured the distance to be ten feet. Defs.' Mot., Ex. B at 56.

Officer Fox testified that he thought he was going to be attacked, so he fired his weapon. He stated that Mr. Duong turned toward him and began walking toward him and lowering his body posture when he fired his weapon. Officer Fox did not aim at Mr. Duong's arm. He did not aim or point the gun at all. He described the shooting as a reflex action. Everything happened within a blink of an eye, and the officer did not go through a deliberate thought process. He was "scared to death." Defs.' Mot., Ex. A at 71; Ex. C at 17, 19.

According to Mr. Duong, however, the police officer shot him as soon as he sat down. He demonstrated his sitting position at his deposition. The lawyers described it as sitting with his knees bent as far as he can go down with his buttocks resting on the back of his shoes. He had the knife in his right hand. He was holding the knife away from his body in the direction of the three men. He was pointing the knife to the wall on his right, away from the Officer. The knife was about six inches long. Defs.' Mot., Ex. B at 43-44; Pls.' Resp., Ex. C.

According to the plaintiff's expert, the evidence shows that the bullet passed through Mr. Duong's right arm, which was outstretched, pointing toward the right wall, and away from Officer Fox. The bullet then entered the dining room hutch. The expert also opined that the scenario at the Duong residence was similar to a scenario outlined in the Telford Borough Police Department's Policy and Procedures Manual. According to this scenario, an officer is not justified in using deadly force against a suspect with a small knife on the far side of the room, as the officer's life is not in jeopardy in such a situation. Pls.' Resp., Ex. C.

When Officer Fox shot Mr. Duong in the upper right arm, Mr. Duong fell to the floor and dropped the knife. He then told Officer Fox that he was the homeowner. Officer Fox called for an

ambulance and held the other three males at gunpoint until backup arrived. Mr. Duong was taken to the hospital and the other men were arrested. Defs.' Mot., Ex. C at 18, 25.

II. Analysis

In their motion for summary judgment, the defendants argue that Officer Fox is entitled to qualified immunity.

There are two steps a Court must follow in determining whether an officer is entitled to qualified immunity in an excessive force case. First, the Court must determine whether the defendant's actions, viewed in the light most favorable to the plaintiff, violated a constitutional right. If the plaintiff's allegations do make out a violation, the Court must then determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

Saucier v. Katz, 533 U.S. 194, 200-207 (2001); Curley v. Klem, 298 F.3d 271, 277 (3d Cir. 2002).

To state a claim for excessive force under the Fourth Amendment, the plaintiff must show that a seizure occurred and that it was unreasonable. In considering whether a seizure was reasonable, the court must judge from the "perspective of a reasonable officer on the scene," rather than with the perfect vision of hindsight. The reasonableness inquiry is an objective inquiry - the question is whether an officer's actions were

objectively reasonable in light of the facts and circumstances confronting the officer. It does not depend on the officer's intent or motivation. The determination is based on the totality of the circumstances, which includes: 1) whether the suspect posed an immediate threat to the safety of the officer or others; 2) whether the suspect was actively resisting arrest; and 3) the severity of the crime at issue. Id. at 279 (citations omitted).

A court may also consider the possibility that the persons subject to the police action are dangerous, the length of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time. Kopec v. Tate, 361 F.3d 772, 777 (3d Cir. 2004) (citations omitted).

The facts here, viewed in a light most favorable to the plaintiff, are sufficient to support the claim that the shooting of Mr. Duong constituted an unreasonable seizure in violation of the plaintiff's Fourth Amendment rights. The Court recognizes the high pressure inherent in the quickly evolving events that Officer Fox encountered in the Duong residence. The disputed facts, however, directly relate to whether Mr. Duong posed an immediate threat to the safety of the officer. See Curley, 298 F.3d at 280.

According to the plaintiff's facts, the plaintiff was in a sitting position thirteen feet away from the officer, with the knife pointed away from the officer. The officer did not give a command to drop the knife. The officer, himself, testified that he did not engage in any deliberative thought process before shooting and fired his weapon as a reflex action. These facts are sufficient to support the claim that Officer Fox's shooting violated Mr. Duong's rights under the Fourth Amendment.³

With respect to the second qualified immunity inquiry, the Court must ask whether the violation of the constitutional right was clearly established, or in other words, whether a reasonable officer would have known that his conduct was in violation of the Fourth Amendment in the situation he confronted. Id. The concern of this inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on police conduct. Saucier, 533 U.S. at 205.

³ In addition, Officer Fox believed that he had walked into a violent domestic dispute. Officer Fox had received a report of suspicious persons from dispatch and knew that three males had entered the house together. It is unclear why Officer Fox believed that he had encountered a domestic dispute rather than a robbery or some other crime. Both home robberies and domestic disturbances, however, potentially involve persons committing a crime and those in need of police protection. According to the plaintiff, Officer Fox shot him when he was sitting in a surrendering position with the knife pointed away from the officer. This shooting is less reasonable under the totality of these circumstances, in which Officer Fox was confronted with both potential suspects and innocent bystanders, than in situations involving only potential suspects.

The disputed issues of material fact with regard to Mr. Duong's position and movement at the time of the shooting must be resolved by a jury before a court can determine whether it would have been clear to a reasonable officer that Officer Fox's conduct was unlawful. See Curley, 298 F.3d at 283. Officer Fox confronted a situation which, under the plaintiff's account, involved a man sitting thirteen feet away with a knife pointing away from the officer. The officer then shot Mr. Duong without thinking. The Court cannot find that Officer Fox can prevail at this stage before these disputed facts are resolved.

The plaintiff's claim for municipal liability under § 1983, however, cannot survive summary judgment. A municipality is liable under § 1983 when the alleged constitutional violation resulted from a municipal custom or policy. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694-95 (1978). A plaintiff must identify the challenged policy and show a causal link between the execution of its policy and the injury. Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984).

The plaintiff alleges that Telford Borough failed to provide proper training to Officer Fox and was negligent in having only one officer on duty. The plaintiffs have not produced any evidence that Telford Borough failed to provide proper training to Officer Fox. They have also not produced evidence that either of these alleged practices caused the injury.

An appropriate order follows.

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v.	:	
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TELFORD BOROUGH, et al.,	:	
Defendants	:	NO. 03-2985

ORDER

AND NOW, this 24th day of June, 2004, upon consideration of the defendants' Motion for Summary Judgment (Docket No. 10), IT IS HEREBY ORDERED that the motion is GRANTED in part and DENIED in part for the reasons set forth in a memorandum of today's date as follows:

1. The motion is GRANTED with respect to the claims for intentional infliction of emotional distress, loss of consortium, claims under 42 U.S.C. § 1981, and the claim under 42 U.S.C. § 1983 against Telford Borough.

2. The motion is DENIED with respect to the claim under 42 U.S.C. § 1983 against Officer Fox.

BY THE COURT:

MARY A. McLAUGHLIN, J.